

Protest of) Date: May 7, 1992
FEDERAL SALES SERVICE, INC.)
Purchase Order No. 104230-92-P-2976) P.S. Protest No. 92-13

DECISION

Federal Sales Service, Inc. ("FSS"), protests the award of a purchase order to Innovative Technologies, Inc. ("ITI"), to provide 24-pin print heads for ALPS 324E printers. FSS alleges that one of the evaluation criteria in the solicitation was changed to accommodate ITI's proposal without notifying the other offerors of the change.

On February 28, 1992, the National Address Information Center ("NAIC"), Memphis, TN, requested that the Office of Procurement, Headquarters, buy 200 print heads, indicating that it needed fifty print heads "now," fifty by May 31, and 100 by July 31.^{1/} The requisition was accompanied by a form identifying three firms which the NAIC had contacted concerning the requirement and the prices each had offered for the print heads.

Using simplified purchasing procedures,^{1/} on March 6, a procurement specialist in the Office of Procurement solicited price quotations from the three vendors whom the NAIC had contacted. She sent the offerors a copy of the requisition, by facsimile, and requested quotations by facsimile.^{1/}

All three solicited firms responded. ITI was the lowest priced offeror. It took no

^{1/} The requisition also indicated that the "Required delivery date" was "ASAP" (i.e., "as soon as possible").

^{2/} Simplified purchasing is used for purchases of standard commercial products worth up to \$50,000. See Procurement Manual ("PM") 4.2.1 b.1. Even with simplified purchasing, the regulations require that competition "must be sought to the extent practicable." PM 4.2.1 d.2. To that end, the PM states that "[p]roposals or quotations must be solicited from a sufficient number of qualified sources (normally at least three) to ensure that the price is fair and reasonable." PM 4.2.1 d.2.

^{3/} In the course of this process, the contract specialist had a telephone conversation with Mr. Mark Hill of FSS. The contract specialist's notes of that conversation include the parenthetical comment "(They have purchased all available print heads.)"

exception to the delivery schedule, and the copy of the requisition it returned included the remark "ok" next to the delivery schedule. FSS offered the next lowest price. In addition to returning the requisition, FSS furnished a copy of a letter it had sent to the NAIC dated March 4, which stated:

[T]he following delivery schedule offered by Federal Sales Service is at this time the best turnaround available from any authorized ALPS parts distributor:

50 printheads shipped immediately
50 printheads shipped May 29
100 printheads shipped July 24

The third offeror, Micro Parts and Supplies, Inc., offered the highest price; it also offered a revised delivery schedule; ten print heads "now," the balance by July 31.

According to the contracting officer's statement, the contracting specialist, puzzled by FSS's statement about having purchased all available print heads, discussed it with the contracting officer. He recommended that she verify the NAIC's needs for immediate delivery. Upon doing so, she was advised that a delivery schedule calling for 10 print heads "now," and 95 on each of the two remaining delivery dates would meet the NAIC's needs. Still concerned about availability, the contracting specialist sought additional sources from the ALPS corporate office. Inquiry to the firms which ALPS identified established their willingness to supply the print heads, but only on 120 day delivery terms.

The contract specialist also contacted ITI to reverify its delivery times. The abstract of offers included ITI's response that "shipping schedule should not be a problem. Must contact ALPS to confirm ARO [after receipt of] purchase order." meet ITI was issued a purchase order on March 10 which reflected the NAIC's revised delivery schedule. FSS was advised that ITI received the purchase order on the same day. Its protest was timely received on March 12.

In its protest, FSS alleges that ITI, even though it was the lowest priced offeror, was unable to meet the delivery schedule, as initially requested. The protester contends that the Postal Service modified the delivery schedule to suit ITI's proposed schedule, without advising other offerors, so that they could modify their quotations to meet the new delivery terms. The protester asks that the ITI award be canceled and a new solicitation issued based upon the new delivery terms.

The contracting officer's statement sets out the sequence of facts summarized above, contending that the adjustment to the delivery schedule was appropriate for either of two reasons: First, a delivery schedule of "now" does not establish a specific date for delivery, being akin to an "as soon as possible" schedule. Secondly, pursuant to PM 4.1.5 g.5., it is appropriate to negotiate with the apparent successful offeror "to tie up loose ends and uncertainties."^{4/} The contracting officer asserts that no changes were

^{4/} PM 4.1.5 g.5. concerns "Award with Discussions." Subparagraph g.5.(b) states that "[a]ny uncertainties or deficiencies remaining in the proposal selected must be clarified or corrected through negotiations leading to a definitive contract. Negotiations must include the disclosure and resolution of all deficiencies and all unsubstantiated areas of cost and price, but no changes may be made in the Postal Service's

made in the requirement that would have affected the basis for selection.

The contracting officer advises that ITI delivered the initial 10 print heads on March 13. On April 1, NAIC discovered that it needed 40 more print heads immediately, which ITI was to have delivered on April 6, adjusting the May delivery quantity accordingly.^{1/} Finally, the contracting officer expressed concern over the appearance that FSS had "cornered" the print head market and had bought a large quantity, wondering if that constitutes restraint of trade or unfair bidding practices.

FSS responded to the contracting officer's statement, noting that it is one of three major distributors of ALPS parts to the Federal government, and taking exception to the contracting officer's assumption that it had attempted to "corner the market" for these print heads. As a primary supplier of ALPS parts to the federal government, it is necessary for FSS to maintain a sufficient supply of all ALPS products.

FSS interprets the contracting officer's statement as establishing that it was the only offeror who could the original delivery schedule of 50 print heads. It notes that it was the only offeror which was not contacted concerning the Postal Service's revised delivery schedule, even though various other vendors who were not solicited were contacted.^{1/} FSS reiterates its request that the purchase order be canceled.

Discussion

This was a price-based simplified purchase, made using an oral solicitation. Since offerors were given the delivery schedule and not asked for one, delivery was not an evaluation criteria. Instead, it was a fixed term of the oral solicitation, like the quantity. Thus, in order to be technically acceptable, an offeror had to be able to meet the required delivery schedule. "A proposal that does not meet the solicitation requirements is technically unacceptable." T&S Products, P.S. Protest No. 90-12, May 30, 1990.

It is clear from the record that the delivery schedule was changed from 50 "now" to 10 "now" after price quotes were taken from the three offerors. PM 4.2.2 g. addresses changes in a solicitation when using simplified procedures:

If, after issuance of a written solicitation, changes must be made in quantity, specifications or delivery schedule, or if corrections are needed, an amendment to the solicitation must be issued. (Emphasis added.)

Although stated in terms of written solicitations, the section also applies to oral solicitations. Forsythe Computers, P.S. Protest No. 91-60, November 8, 1991. A change in

requirements or in the proposal that, if made before contractor selection, would have affected the basis for selection."

^{5/} Although the contracting officer does not appear to recognize it, this further revision in NAIC's needs appears to validate its initial delivery requirement.

^{6/} FSS seems to be in error in this regard. We do not read the contracting officer's statement as evidencing that Micro Parts was contacted concerning the revised delivery schedule.

the delivery schedule after quotes are received requires an amendment and a new round of quotes. See Forsythe Computers, supra.

PM 4.1.5 g.5., quoted by the contracting officer as justification for the negotiation of a revised delivery schedule, is not applicable here. This was not a negotiated purchase with discussions, the change in the delivery schedule was not the correction of a deficiency, and the change was one which, if made before contractor selection, would have affected the basis for selection (since, once ITI had expressed its need to verify delivery after receipt of the order, ITI's quote was not the otherwise successful one).

The protest is sustained. The contracting officer is directed to terminate for convenience the balance of ITI's purchase order and resolicit the remaining requirement.^{1/}

The protest is sustained.

William J. Jones
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Office of Contract & Property Law

^{1/} We note the contracting officer's concern that FSS's apparent possession of most of the available ALPS print heads might be restraint of trade or an unfair bidding practice.

PM 1.8.2 a. states that "[a]ny suspected anticompetitive practice must be reported promptly through normal management channels to the responsible APMG. . . . If the APMG believes that there is reasonable evidence of violation of Federal antitrust laws, the report must be forwarded to the . . . Postal Inspection Service." In addition, PM 1.8.1 advises that "[p]roposals suspected of reflecting anticompetitive practices may be rejected."

The contracting officer had the option of rejecting FSS's proposal, under PM 1.8.1, and forwarding his concerns to the APMG. Unless that procedure is followed prior to resolicitation, FSS must be allowed to submit a quote for the remaining requirement.